UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WALT DISNEY PARKS AND RESORTS U.S.
d/b/a WALT DISNEY WORLD,

Case No. 12-UC-203052

Employer,

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 385,

Petitioner,

and

MARY HOGAN, *et al*.,

Proposed Intervenor Employees.

INTERVENOR EMPLOYEES' REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND ORDER

Alyssa K. Hazelwood
John C. Scully
c/o National Right to Work
Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Telephone: (703) 321-8510
Fax: (703) 321-9319
akh@nrtw.org
jcs@nrtw.org

Counsel for Proposed Intervenor Employees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

INTERVENOR EMPLOYEES' REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND ORDER

"[U]nder Section 9(a), the rule is that the employees pick the union; the union does not pick the employees." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018); *see* 29 U.S.C. §159. The National Labor Relations Board's ("NLRB" or "Board") application of its unit clarification and accretion standards often turns this fundamental principle on its head, allowing unions to impose their exclusive representation on non-consenting employees. Neither standard considers the fundamental right of employees to refrain from union representation, or addresses whether the employees in question even want union representation. The National Labor Relations Act ("NLRA" or "Act") exists for the protection of employee rights, not for the convenience of unions or employers. Any Board doctrine or practice must be consistent with this purpose.

Pursuant to NLRB Rules and Regulations § 102.67, Employees-Proposed Intervenors Mary Hogan, Penelope Wiggins, Shanan Boger, Michael Wimmer, Lesley Ingles, Janet Knight, Devi Wise, Jennifer Shaw, Gary L. Katz, Therisa Lamb, and Daniel J. Munoz (collectively, "Intervenor Employees") submit this Request for Review of Regional Director David Cohen's Decision and Order Clarifying Bargaining Units, dated May 8, 2018 ("RD Decision") that anointed the International Brotherhood of Teamsters, Local 385 ("Local 385" or "Union") as their representative without a vote and without their consent.[1]

Intervenor Employees are employed by Walt Disney Parks and Resorts U.S. ("Disney" or "Employer") in a distinct classification called Ride Service Associates ("RSAs"). As the accompanying sworn declarations show, they were hired for these positions by Disney as non-

[1] In the alternative, Intervenor Employees submit this document as an amicus brief in support of the Employer's Request for Review of the Regional Director's Decision and Order Dated May 8, 2018.

union employees, are not members of the Union, and do not wish to be represented by it. *See* Ex. A to Intervenor Employees' Motion to Intervene or, in the Alternative, Motion to File an Amicus Brief in Support of the Employer (hereinafter, "Ex. A."). Without seeking input from the Intervenor Employees and their RSA colleagues regarding their representational preferences, the Union petitioned Region 12 to "clarify" its current bargaining units at Disney to include these non-unionized employees. On May 8, 2018, the Regional Director "clarified" the bargaining unit by forcing these unwilling Intervenor Employees and the other RSAs into the Union's mega bargaining unit containing a mixed medley of employee classifications.[2]

Intervenor Employees strenuously object to the RD Decision and submit this Request for Review to demonstrate that the Regional Director erred in "clarifying" the unit in this case. The Board should reverse the RD Decision, and overrule or modify its unit clarification and accretion doctrines to actually account for the representational preferences of the "clarified" or "accreted" employees. Alternatively, the Board should apply these standards restrictively to properly protect employee free choice—the touchstone of the Act. Further, in this case, even under the current standards, this Request for Review should be granted and the RD Decision overturned, as the Regional Director misapplied current Board precedent in his analysis. Intervenor Employees implore the Board to recognize and protect their and other employees' free choice rights in this, as well as in any future, unit clarification or accretion analysis.

[2] This decision has had immediate consequences. Subsequent to Disney's filing of its Request for Review, the Union has engaged in attempts to bargain with Disney over wholesale changes in the RSAs' terms and conditions of employment, contrary to the wishes of Intervenor Employees. *See* Disney's Renewed Motion to Stay, Ex. A. In response, Disney filed a Renewed Motion to Stay on August 2, 2018. *Id.* As recipients of any change in terms and conditions of employment bargained over, Intervenor Employees request that the Board grant Disney's Renewed Motion to Stay so they can keep their terms and conditions of employment during the pendency of this litigation.

FACTS

In March 2017, Disney created a new service for guests, the "Minnie Van" program, with a new RSA job classification. TR. 45-46, 80.[3] There are approximately seventy-four full-time RSAs. TR. 49. The "Minnie Van" program is a point-to-point, individualized transportation service. Guests use a Lyft mobile phone application to request on-demand rides to and from specific locations from RSAs driving the so-called "Minnie Vans." TR. 45, 50. RSAs, therefore, perform an individualized service for these guests, including point-to-point transportation without set routes and schedules. Based on individual guests' requests via the Lyft application, RSAs deliver the guests to the specific locations of their choosing, all the while offering unique and individualized commentary on the resorts and experiences at Disney. TR. 51. RSAs may also make brief stops for their guests along their route. TR. 51. RSAs are required to engage with their guests, enhance their experience, and address any concerns they may have regarding their stay, either directly or by contacting the correct guest recovery cast member. TR. 52. Between rides, RSAs have discretion to decide to wait for another ride at their last drop-off point or to drive around looking for other guests to help. TR. 88-89. RSAs do not have specified guest drop-off and pick-up areas, and they may pick up or drop off guests within the bus loading zones. TR. 95, 150-51. In addition, RSAs promote the vehicles they are driving to customers as part of an agreement Disney has with Ford and Chevrolet. TR. 54, 117. Thus, RSAs are not bus drivers driving along pre-determined routes, or drivers who simply move things from Point A to Point B. They serve guests as personal guides around Disney's properties, and drive them around in "Minnie Vans." TR. 45-46.

[3] References to the transcript of the hearing held on November 16, 2017, are denoted by "TR."

RSAs report to their own department within the transportation division. TR. 47. Their management structure is as follows: RSAs report to a Minnie Van service guest manager, who reports to a transportation projects manager, who reports to a manager of transportation operations, who reports to the vice president of transportation. TR. 47. RSAs report for work to their own department trailer. TR. 69. They wear a special uniform consisting of black denim with a grey shirt. TR. 70. RSAs are required to have a valid driver's license, but are not required to have a commercial driver's license. TR. 52-53. RSAs' schedules are demand-based, meaning their hours are not consistent. Rather, RSAs are scheduled based on guest demand for their services. TR. 53. They are paid on a merit pay system, which is demonstrably different from the pay scale for bus drivers outlined in the Teamsters' CBA. TR. 71.

The training received by RSAs is not centered around bus driving, but around providing an individualized guest experience and being knowledgeable about Disney's properties. TR. 61. RSAs do not receive driver training. TR. 53. Instead, their training focuses on guest interaction, storytelling, engaging with guests, and performing guest recovery. TR. 53-54. Specifically, RSAs are trained to know everything that is going on at Disney so they can inform guests of events and activities based on the guests' preferences. TR. 54. RSAs are also trained on the operation and technologies of their specific vehicle so they can showcase these features to their guests. TR. 54.

Other, non-union positions provide similar individualized transportation on Disney property with an emphasis on guest experiences. TR. 55-58. For a fee, VIP tour guides drive guests around the properties and take them to specific Disney attractions of interest to the guests, giving them an individualized experience. TR. 55-57. Golden Oak Transportation Services Associates engage in point-to-point transportation for Golden Oak members and their guests.

TR. 60-61. The training received by these employees is centered around providing an individualized guest experience and being knowledgeable about Disney's properties. TR. 61.

In contrast, bus drivers have duties different from the RSAs. TR. 67. Bus drivers operate on a pre-planned route, irrespective of whether or not guests are on the bus. TR. 67. Bus drivers have guest contact, but it is incidental to their primary job of running their assigned routes safely. TR. 68. Bus drivers might choose to give a "spiel," but they are not required to engage with guests in any individualized manner. TR. 68. While they may engage in limited guest recovery, such as providing a crying child with a trinket or informing guests where they can go to get specific guest recovery, they do not actively provide guest recovery. TR. 68-69, 144-45.

Bus drivers are required to have a commercial driver's license. TR. 67. Bus driver training focuses on bus safety—even if drivers have a commercial driver's license, they are required to take Disney's certification class. TR. 68. They are not trained in guest engagement. TR. 68. They are also required to conduct vehicle inspections. TR. 145. They share no common day-to-day supervisors or managers with RSAs. TR. 47-48. Bus drivers are in a separate department within the division of transportation. TR. 47. They report to guest experience managers who report to the manager of transportation, who reports to the director of transportation, who then reports to the vice president of transportation. TR. 47-48. Bus drivers report to work at their designated bus hub, TR. 69, wear a unique uniform, consisting of grey pants and a grey shirt, TR. 70, 167, and are paid based on the CBA. TR. 71. There is no cross-over between RSAs and bus drivers. RSAs cannot pick up a bus driver's shift, and vice versa. TR. 71. In particular, RSAs are not necessarily qualified to perform the work of the bus drivers.

RSAs have concerns different from the Union-represented bus drivers. They are not affected by many of the concerns that are the subject of the bus drivers' CBA, such as specific

rest periods, scheduling issues, and bidding for specific routes. *See* Ex. A. RSAs' health insurance premiums, vacations, and sick leave policies are different from bus drivers. TR. 122. The number and amount of breaks are different: RSAs get FLSA breaks and thirty-minute lunches unless otherwise scheduled. TR. 168. Bus drivers have set breaks and lunches, including fifteen-minute breaks every four hours. TR. 168-69.[4]

Many RSAs are long-term Disney employees who previously worked in non-union positions. *See, e.g.*, Ex. A (Decl. Wiggins at 1; Decl. Knight at 1; Decl. Katz at 1; Decl. Wimmer at 1). Many have accumulated company seniority outside of the Union bargained for seniority system, which they worry they would lose if forced into a unionized bargaining unit. Many RSAs (especially those who have worked at Disney for years in non-union positions), are concerned they would lose their 401(k) retirement plans and be thrust into a failing Teamsters-sponsored pension plan, which would take years of work to vest in, much less to acquire enough work credits to have a reasonable retirement income. *See* Exhibit A; *see also*, *e.g.*, https://mycentralstatespension.org/helpful-resources/pension-crisis.

Subsequent to the RD Decision and Disney's filing of its Request for Review, Intervenor Employees' concerns about being lumped into a massive Teamster bargaining unit have been validated. As shown by Disney's Renewed Motion to Stay and attached exhibits, filed August 2,

[4] The transcript and the RD Decision also make reference to "tram operators" or "parking host/hostesses." However, the RD Decision's analysis primarily focuses on the job classification of bus driver and it concludes that the unit clarification is warranted based on the RSAs similarity to the work historically being performed by "the classification of bus driver." RD Decision at 16. Therefore, the job classification of "tram operator" or "parking host/hostess" is not relevant to this appeal. To the extent the Board considers this job classification relevant, Intervenor Employees adopt Disney's statement of facts and analysis with respect to that job classification.

2018, the Union intends to disregard the RSAs' special status and engage in wholesale changes to their terms and conditions of employment.

ARGUMENT

A. The Unit Clarification and Accretion Standards Are Not Found In, and Are Inconsistent With, the Act

The notion of absorbing employees into a preexisting bargaining unit without a vote *or any say whatsoever* is not found in the Act. Indeed, it is inimical to the Act. *See Colo. Fire Sprinkler*, 891 F.3d at 1038 ("The *raison d'être* of the National Labor Relations Act's protections for union representation is to vindicate the *employees'* right to engage in collective activity and to empower *employees* to freely choose their own labor representatives."); *McCormick Constr. Co.*, 126 NLRB 1246, 1259-60 (1960) (quoting *Shoreline Enters. of Am., Inc. v. NLRB*, 262 F.2d 933, 944 (5th Cir. 1959)) ("The National Labor Relations Board is not just an umpire to referee a game between an employer and a union. It is also a guardian of individual employees."). Rather, unit clarification and its counterpart, accretion, are Board-created doctrines that fail to account for the wishes of the employees being added to a union's bargaining unit—the individuals most directly affected by this change and whose rights the Act is designed to protect. In fact, "the NLRA confers rights only on *employees*," and any privileges that a labor union enjoys are merely derivative of the employees' Section 7 rights. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992); *see* 29 U.S.C. § 157; *see also New York New York, LLC*, 356 NLRB 907, 914 (2011); *Leslie Homes, Inc.*, 316 NLRB 123, 127 (1995). "If the rights of employees are being disregarded," it is incumbent upon the Board "to take affirmative action to effectuate the policies of the Act" and ensure that "those rights be restored." *McCormick Constr.*, 126 NLRB at 1259. Thus, any Board policy or precedent contrary to the policies of the Act must be disregarded.

The Act explicitly states that exclusive representation will only be bestowed upon labor organizations that have majority support, supported by evidence of majority employee consent: "Representatives designated or selected for the purposes of collective bargaining by *the majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit." 29 U.S.C. § 159(a) (emphasis added). Moreover, in determining an appropriate bargaining unit, the Board is "to assure to employees the fullest freedom in exercising the[ir] rights guaranteed by [the Act]." *Id.* at § 159(b). The current unit clarification and accretion standards are contrary to both of these provisions because: (1) they allow a union to add employees to its bargaining unit and maintain its exclusive representative status without having to prove it has majority support of the newly expanded unit; and (2) employee freedom to be or not to be represented by a union is ill served when the Board modifies a unit to include employees without their input or consent.

As such, unit clarification and accretion ignore employees' core Section 7 right to freely choose or reject a bargaining agent, a right that is the very "essence of Section 7." *McDonald Partners, Inc.*, 336 NLRB 836, 839 (2001) (Chairman Hurtgen, dissenting). The Board has already recognized this "fly in the ointment" and has attempted to rectify it by restrictively applying the accretion doctrine because "it is reluctant to deprive employees of their basic right to select their own bargaining representative." *Gitano Grp., Inc.*, 308 NLRB 1172, 1174 (1992) (footnote omitted). However, a standard of "reluctance" to deprive employees of their right to choose their exclusive bargaining representative is insufficient. The Board was designed to protect Section 7 rights, not merely be reluctant to throw them away when it benefits a union (or an employer) to do so.

Such a cavalier approach to employees' rights has been soundly rejected by the federal courts. For example, in *Nova Plumbing, Inc.*, 336 NLRB 633, 636-67 (2001), *reversed sub nom. Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (D.C. Cir. 2003), the Board deferred to a contractual agreement between an employer and union, stating that the union had majority employee support, even though there had been no independent verification of the truth of that assertion. The D.C. Circuit reversed, holding that "[b]y focusing exclusively on employer and union intent, the Board has neglected its fundamental duty to protect employee section 7 rights, opening the door to . . . egregious violations." *Nova Plumbing*, 330 F.3d at 537; *see also Colo. Fire Sprinkler*, 891 F.3d at 1038 ("[U]nder Section 9(a), the rule is that the employees pick the union; the union does not pick the employees.").

These *ultra vires* Board-created doctrines cannot be saved by, and indeed are inconsistent with, the stated policies of the Act. Those policies are, in pertinent part: "*encouraging* the practice and procedure of collective bargaining" and "protecting the exercise by workers of full freedom of association, self-organization, and *designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (emphasis added). The ability of a union to shoehorn additional groups of individuals into a bargaining unit without an election *compels* rather than "encourages" collective bargaining, and *deprives* employees of their freedom of association and their freedom to designate (or not to designate) a representative to bargain on their behalf. It undermines the Act's policies to force employees to be represented by a union that is not the selected representative of the employees.

Even the often-used justifications of "industrial stability" and "labor peace" are not served by these policies. No party, save the Union, is better served by including Intervenor

Employees and their fellow RSAs into the Union's bargaining unit without the requisite showing of support and an election. RSAs are not better served by having their freedom to choose their representative stripped from them. Disney is obviously not better served—if it were, it would not be opposing the Union's unit clarification petition. The Union's currently-represented employees are not better served—they will keep the Union as their exclusive bargaining representative regardless of whether a few dozen RSAs are included in or excluded from their unit. Labor peace and stability are not served by forcing disgruntled employees to accept, without an election or any other input, a compulsory representative they despise. Rather, industrial stability and labor peace are better served when employees are able to choose whether they want to be represented and by whom they are represented, and when a bargaining representative is supported by a majority of those it represents. The Union is the only entity that stands to benefit from a unit clarification or an accretion, by acquiring additional dues or fee payers without having to produce evidence of employee support.

Therefore, the Board must overrule its prior precedents allowing unions and employers to force representation on employees without directly considering the affected employees' representational preferences. The Board should realign its policies to mirror the actual text of the Act. The best practice would be to eliminate the doctrines of accretion and unit clarification altogether and require a Board-run, secret ballot election, based on an initial showing of interest, to determine whether the RSAs want the Union's representation.

B. Alternatively, the Board's Unit Clarification and/or Accretion Standard Must Be Modified or Strictly Construed to Preserve Employees' Statutory Rights

Should the Board not eliminate entirely the unit clarification and/or accretion standards, it must modify them to account for employee preferences, or at least strictly construe them to mitigate their infringement on employees' rights.

The Board has recognized this principle and has restrictively applied these standards. The Board "considers accretion to be the exception to the rule of employee self-determination, applying it "restrictively, so as not to tread too heavily on the right of employees to choose their own collective bargaining representative." *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) (citing *Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 595 F.2d 844, 851 (D.C. Cir. 1979); *Passavant Ret. & Health Ctr., Inc*., 313 NLRB 1216, 1218 (1994)). The Board "will not, under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret [ballot] election." *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969). "And because misuse of accretion poses a significant threat to the self-determination rights of employees guaranteed by § 7 of the NLRA, courts have been particularly vigilant in assuring that the Board observes in practice the strict standards it has adopted for accretion orders. . . . If there is any substantial doubt, the policy of the NLRA requires that an election be conducted." *Balt. Sun Co. v. NLRB*, 257 F.3d 419, 429 (4th Cir. 2001) (internal citations omitted); *see also AT Wall Co.*, 361 NLRB 695, 697 (2014) (quoting *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001)) ("The Board generally follows 'a restrictive policy in finding accretions to existing units because the Board seeks to insure that the right of employees to determine their own bargaining representatives is not foreclosed.'"). The Board applies its conclusory unit clarification standard even more sparingly, noting that it is only appropriate when "a new classification is performing the same basic functions as a unit classification historically had performed." *Premcor, Inc.*, 333 NLRB 1365, 1366 (2001).

Strictly construing these standards or modifying them to include an analysis of employee preferences is imperative because employees' interest in choosing, or not choosing, an exclusive representative is not merely academic. NLRA Section 9(a) grants unions extraordinary powers. As an exclusive representative, a union has the authority to speak and contract for all employees in a unit to the exclusion of these employees, and irrespective of whether individual employees approve or not. *See Wallace Corp. v. NLRB*, 323 U.S. 248, 255-56 (1944). This authority "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees," meaning represented employees are no longer able to deal directly with their employer. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); *see also Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 200 (1944); *Ga. Power Co.*, 342 NLRB 192 (2004) (holding it unlawful under the NLRA for employer to deal directly with individual employees concerning mandatory subjects of bargaining when those employees have an exclusive representative). An individual employee "may disagree with many of the union decisions but is bound by them." *Allis-Chalmers*, 388 U.S. at 180. The Supreme Court recognized that this constitutes a "loss of individual rights." *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 401 (1950).

Exclusive representation turns normal agency relations upside down, because, unlike the traditional agency framework, the principal (the employee) does not control or direct the agent (the union). *Teamsters, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990) ("[A]n individual employee lacks direct control over a union's actions."). Unions can and do bar represented nonmembers from attending union meetings or voting on critical workplace matters. *See, e.g.*, *NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192 (1986); *Am. Postal Workers Union (Postal Serv.)*, 300 NLRB 34 (1990). Overall, an exclusive representative's "powers [are]

comparable to those possessed by a legislative body both to create and *restrict the rights* of those whom it represents." *Steele,* 323 U.S. at 202 (emphasis added).

Exclusive representatives can, and often do, pursue agendas and enter into agreements that represented employees oppose and that harm employees' interests. These include contractual clauses that require non-members to pay compulsory fees to the union as a condition of their employment, and clauses that require employers to: (1) provide the union with continually updated lists of information about all employees, including personal contact information; (2) contribute to union-operated healthcare, pension, and training funds on which union officials sit as paid trustees, 29 U.S.C. § 186(c)(5-8); and (3) allow employees to conduct union business on work time, *e.g.*, *IAM, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Group,* 387 F.3d 1046, 1058-59 (9th Cir. 2004); *see also Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1287 (11th Cir. 2010) (employee has standing to challenge labor union's organizing agreement because if the union succeeds he "will have been thrust unwillingly into an agency relationship" he opposes). This is evident here where, despite Intervenor Employees' wish to keep their current non-union benefits, *see*, Ex. A, the Union has demanded Disney engage in wholesale bargaining over their terms and conditions of employment, *see* Disney's Renewed Motion to Stay, Ex. A.

Moreover, "accreted" or "clarified" employees cannot simply vote out their newly-imposed representative by themselves. Should the RSAs wish to exercise their right to refrain from union representation, they would need to decertify the *entire bargaining unit* represented by the Trades Council—up to 24,000 employees. TR. 24; *see generally Mo's West*, 283 NLRB 130, 130-31 (1987) (Member Dotson, dissenting); *Gibbs & Cox, Inc.*, 280 NLRB 953, 956-59 (1986) (Members Dotson and Dennis, dissenting). Moreover, even if such an endeavor could be

undertaken, the Board's series of contract bars and insulated periods would likely prohibit them from decertifying the Union for up to three years (and potentially longer should they fail to comply with complicated and counter-intuitive Board-created timeframes and procedural hurdles for filing decertification petitions). *See, e.g.*, NLRB Rules & Regulations §§ 102.60, 102.61(c); *UGL-UNICCO Serv. Co.*, 357 NLRB 801 (2011) (successor bar); *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000 (1962) (60-90 day window period for filing of decertification petitions); *Trinity Lutheran Hosp.*, 218 NLRB 199 (1975) (120-90 day window period for filing decertification petitions for healthcare institutions); *Appalachian Shale Prods. Co.*, 121 NLRB 1160 (1958) (contract bar for three years).

Certainly, if employees wish to delegate their right to speak for themselves, they are able to do so through the representation procedures outlined in the Act. *See Colo. Fire Sprinkler*, 891 F.3d at 1038. However, Board doctrines should not allow unions to silence and speak for new groups of employees without accounting for their representational preferences. The danger of a broad interpretation of the unit clarification or accretion doctrines is illustrated by the RD Decision. Intervenor Employees do not want to be represented by the Union. Not only were they never asked if they wished representation, but they were kept in the dark while the Union sought to dragoon them into it—Intervenor Employees were unaware of the unit clarification proceedings until after the unit was clarified by the RD Decision. *See* Ex. A. Yet the Regional Director decided their fate by treating the RSA employees' desires as irrelevant.

In short, if the Board does not take this opportunity to overrule or modify its unit clarification and accretion standards to take into account employee representational preferences, it should at least narrow and strictly construe those standards to better protect employees' rights under the Act.

C. Even Under the Board's Current Standards, the Regional Director Erred in Clarifying the Bargaining Unit

1. The Union waived its right to clarify additional job classifications into the bargaining unit in the CBA.

The Union waived its ability to add RSAs into the bargaining unit during the term of the current collective bargaining agreement ("CBA") by express disclaimer language. The Board "has long-recognized that parties to collective-bargaining agreements may waive certain of their rights, including some fundamental statutory rights" when they are "clear, knowing, and unmistakable." *Springfield Terrace Ltd.*, 355 NLRB 937, 937 (2010) (citing *N. Pac. Sealcoating Inc.*, 309 NLRB 759 (1992)). This includes "a union's contractual agreement not to represent those employees during a collective-bargaining agreement's term," *UMass Mem'l Med. Ctr.*, 349 NLRB 369, 369 (2007) (citing *Briggs Ind. Corp.*, 63 NLRB 1270 (1945)), when it is "an express promise on the part of the union to refrain from seeking representation of the employees in question or to refrain from accepting them into membership," *id.* at 369-79, (quoting *Cessna Aircraft Co.*, 123 NLRB 855, 856 (1959)).

The Regional Director correctly described this standard, but erred in his application of the standard and by processing and granting the Union's petition. Intervenor Employees adopt and incorporate herein the arguments of Disney regarding this matter because, as party to the contract, Disney is in a better position to understand, describe, and interpret its own contract. However, Intervenor Employees would like to add a few additional points.

First, the Region improperly analogized the collective bargaining agreement in this case to that at issue in *Springfield Terrace*. In *Springfield Terrace*, the union merely agreed to *exclude* LPNs from the bargaining unit it represented and agreed that it would follow the procedure in the contract for requesting recognition of their representation of non-excluded

employees and for the purposes of the CBA. 355 NLRB at 937. However, the union's petition at issue there sought to represent LPNs in a *separate bargaining unit*. Therefore, the Board held that mere exclusionary language in the current bargaining unit's contract, coupled with a procedure for adding job classifications to the current bargaining unit, did not operate as an express promise to refrain from seeking representation of LPNs in a separate bargaining unit. *Id.* This is undeniably true, as the union merely agreed to exclude the LPNs from the existing contract and bargaining unit, it did not disclaim interest.

Here, the CBA does not merely exclude certain employee classifications from its reach, but the Union expressly *disclaimed* representation of employees not listed in the contract, now and in the future:

> The Service Trades Council Union and its individual international and local Unions disclaim any interest now, or in the future, in seeking to represent any employees including the Animal Keeper classification of the Employer other than those in the classifications set forth in Addendum A, except as to the classification described in Case No. 12 RC 4531, affirmed 215 NLRB No. 89.

RD Decision at 4 (quoting Art. 4, § 2 of the current CBA). The Regional Director sidesteps this clear waiver by interpreting a second provision in the contract that requires the employer to discuss wage rates for newly created job classifications with the Union, and to subject those wage rates to the grievance procedure. RD Decision at 13. This requirement to "discuss" wage rates is a far cry from actual representation and/or bargaining over the limited term of wages rates. The Regional Director is disingenuous to conclude that this "discussion" provision overrides an express disclaimer of representation.

Second, the Regional Director relies on flawed logic in his justification that the collective bargaining history of the parties overrides the express disclaimer of interest in the contract. The Regional Director cites the fact that additional job classifications have been added by the parties

to the contract. Presumably, this fact is presented to show that the Union cannot possibly have disclaimed representation of job classifications in the future, because it was able to add additional classifications between contracts. This is *not* what a disclaimer of interest pursuant to the *Briggs Indiana* doctrine requires. The *Briggs Indiana* rule provides that a union can waive its ability to organize job classifications *for the term of the contract*. *See UMass Mem'l Med. Ctr.*, 349 NLRB at 369-70 (citing *Briggs Ind. Corp.*, 63 NLRB 1270). Thus, the waiver language does not apply in perpetuity, and when the parties negotiate a new contract, the Union and Disney are (and were) free to re-negotiate all terms of the contract, including Addendum A and the waiver language.[5]

Third, the Union should be held to the terms of the contract to which it expressly agreed. The Board has consistently required employees to abide by the terms of onerous boilerplate checkoff authorizations that restrict their ability to stop paying union dues on the basis that it was a "voluntary agreement." *See, e.g., IBEW Local No. 2088 (Lockheed Space Operations)*, 302 NLRB 322, 328 (1991); *Smith's Food & Drug Ctrs., Inc.*, 366 NLRB No. 138 (July 24, 2018). This Union has also held, or attempted to hold, employees to express and onerous checkoff terms. *See Int'l Bhd. of Teamsters Local 385*, 366 NLRB No. 96 (June 20, 2018). These checkoff forms are printed out *en masse* and given to employees to sign, in many cases under high pressure or coercive circumstances. Employees have no ability to negotiate a checkoff's terms. Here, the Union was intimately involved with bargaining and negotiating the current collective bargaining agreement. If the Board and the Union can hold employees to express

[5] Union Business Agent Walter Howard testified that he did not recall this provision being discussed at the bargaining sessions. TR. 160-61. However, this statement is irrelevant to any determination of whether the Union agreed to the clause. The Union had the opportunity to bargain over the contract and agreed to the contract with the disclaimer provision included.

terms buried in the fine print of a checkoff, the Union should be held to the express terms of a contract *it actually negotiated*.

Therefore, it is clear that the Union expressly disclaimed representation for all employees of Disney not named in Addendum A to the contract. Since the RSA classification is not included in Addendum A, the Union has clearly, knowingly, and unmistakably disclaimed interest in representing them, at least for the term of the current collective bargaining agreement, *see Springfield Terrace*, 355 NLRB at 937, and the Board should find that the Regional Director erred by processing and granting the Union's petition.

2. The Regional Director erred in applying the unit clarification standard.

Unit clarification is only appropriate when the employees in the unit are doing the same work. "Once it is established that a new classification is performing the same basic functions as a unit classification historically had performed, the new classification is properly viewed as remaining in the unit rather than being added to the unit by accretion." *Premcor, Inc.*, 333 NLRB at 1366. In other words, unit clarification is only appropriate when the job classifications are so similar that the new job classification should be considered part of the unit already.

In *Premcor*, the employer was consolidating a bargaining unit position into a centralized area because technological advances allowed monitoring sites to be consolidated into one control unit. *Id.* at 1365. The employer created a new job classification, PCC, to work in the control room and monitor all sites. *Id.* Previously, operator 1s had performed this work remotely at the different monitoring sites. *Id.* The transfer of the monitoring work to this centralized control center eliminated the operator 1 position, and all of the newly classified PCCs were operator 1s or individuals who had performed operator 1 work. *Id.* Thus, the Board determined that the PCCs were properly considered part of the bargaining unit because they were performing the

"same basic functions" –i.e., the same job operator 1s performed except technology allowed PCCs to do it more efficiently and over more sites at a control center. *Id.* at 1366.

Put simply, *Premcor* "involve[d] situations where work that has historically been part of a unit was *transferred* and *removed* from the unit and assigned to a newly created job classification." *Ford Motor Co.*, 2018 WL 802060 (NLRB Div. of Judges Feb. 8, 2018). That is clearly not the case here. No evidence was presented that bargaining unit work was transferred to RSAs and removed from the bargaining unit. There was no evidence presented that bus drivers run fewer routes or that their hours have been curtailed or, as in *Premcor,* that their job classification was effectively ended due to "technological advances," or that the RSA position was created to replace bus drivers.

Moreover, in *AT Wall Co.*, 361 NLRB 695 (2014), the Board found that unit clarification was inappropriate despite the Regional Director's over-broad definition of the work traditionally done by unit employees. First, the Board looked to the definition of the unit. *Id.* at 697. It noted that the unit was narrowly defined by specific job classifications, as opposed to job functions. *Id.* at 698; *compare Developmental Disabilities Inst., Inc.*, 334 NLRB 1166 (2001) (noting that the unit was defined as "instructional employees" and therefore a new classification providing "instruction" was deemed included in the bargaining unit). The Board found that the new employees could not "reasonably be viewed as performing the same basic functions" as unit employees because the new employees "make substantially different products, using different machinery and processes that require significantly different training." *AT Wall*, 361 NLRB at 698. The Board also found it significant that no bargaining unit employees were displaced. *Id.*

Here, the Regional Director determined that unit clarification was appropriate because "[t]he basic transportation service the RSAs provide is functionally the same as has historically

been provided by the bargaining unit bus drivers." RD Decision at 15. The Regional Director ignored the fact that the bargaining unit is narrowly defined by the specific job classifications listed in Addendum A. *Id.* Instead, he defined the bargaining unit was "work performed in a specific well defined area." *Id.* While it is true that the boundaries of the work performed are limited to a specific area, the Regional Director failed to mention that the Union represents only the specific job classifications listed in Addendum A, to the exclusion of all other job classifications, pursuant to its disclaimer in the CBA. *See* RD Decision at 4 ("local Unions disclaim any interest now, or in the future, in seeking to represent any employees including the Animal Keeper classification of the Employer other than those in the classifications set forth in Addendum A, except as to the classification described in Case No. 12 RC 4531 . . . ."). Thus, the Regional Director erred in failing to narrowly construe the bargaining unit.

The Regional Director reasoned, "RSAs are similar to the bus drivers and tram employees in that employees in all of these jobs transport guests within the limits of the Employer's property." RD Decision at 15. Yet in making this finding, the Regional Director also noted that RSAs and bus drivers have significant differences in their work demands. Inconsistently (and conveniently for the Union), the Regional Director distinguished the non-union VIP tour guides and the Golden Oak Transportation Service Associates from RSAs and bus drivers because of their specific job qualifications and training despite the fact that they also transport guests on Disney properties. *Id.* at 16.

Moreover, the Regional Director failed to explain how the unit clarification standard was appropriate in this case, other than stating that both bus drivers and RSAs provide motorized transportation services. However, unlike in *Premcor*, bargaining unit work was not removed from the unit due to advances in technology. Rather, Disney merely added an *additional* service

with new and different features from any job classification already within the existing bargaining unit. This situation is similar to the one in *AT Wall*. As in that case, there is no evidence that bargaining unit members were displaced; bus drivers and RSAs perform different duties, namely, bus drivers provide bus service for visitors on specified routes and RSAs provide point-to-point, on demand, transportation; operate different machinery, namely bus drivers operate buses and RSAs operate passenger vehicles; and require substantially different training, namely bus drivers are required to have a commercial driver's license and are trained primarily on driving and bus safety and RSAs are not required to have a commercial driver's license, are given no driving training, and are primarily trained in guest interaction.

Finally, the Union's insistence that Disney engage in bargaining over the RSAs' terms and conditions of employment is further evidence that the Regional Director improperly clarified the unit to include RSAs. *See* Disney's Renewed Motion to Stay, Ex. A. If RSAs were truly so similar to bus drivers that they are properly in the unit already, it would follow that RSAs would be absorbed into the same terms and conditions as the bus drivers. Instead, the Union is seeking to engage in wholesale bargaining over all of the RSAs' terms and conditions of employment. If they are indeed so dissimilar to other CBA job classifications that the Union wishes to bargain over everything, then they cannot properly be clarified into the bargaining unit.

Therefore, the Regional Director clearly erred in applying the unit clarification standard.

3. Even applying the current accretion standard results in a finding that RSAs should not have been added to the Union's bargaining unit.

The Regional Director's error is highlighted by the fact that the RSAs do not even satisfy the Board's current accretion analysis. If RSAs cannot be added to the unit by accretion, they most certainly cannot be properly viewed as "remaining in the [bargaining] unit." *Premcor*, 333 NLRB at 1366.

The Board's standard for determining an accretion has two prongs. First, the Board must determine whether the employees have "little or no separate group identity and thus cannot be considered to be a separate appropriate unit." *Safeway Stores, Inc.*, 256 NLRB 918, 918 (1981) (footnote omitted). Second, the Board must determine whether the employees "share an *overwhelming* community of interest" with the bargaining unit into which they are being accreted. *Id.* (emphasis added); *see also Balt. Sun*, 257 F.3d at 427 (internal citations omitted) ("While a mere finding of a 'community of interest' among affected employees may be sufficient to justify the Board's action in defining a unit to conduct a representation election, a decision to accrete employees to a unit *without an election* requires a showing of much more."). To determine whether the employees share an overwhelming community of interest, the Board considers the following factors: "integration of operations, centralized control of management and labor relations, geographic proximity, similarity of terms and conditions of employment, similarity of skills and functions, physical contact among employees, collective bargaining history, degree of separate daily supervision, and degree of employee interchange." *Frontier Tel. of Rochester, Inc.*, 344, NLRB 1270, 1271 (2005) (citing *E.I. du Pont de Nemours, Inc.*, 341 NLRB 607, 608 (2004)). The "'two most important factors'—indeed, the two factors that have been identified as 'critical' to an accretion finding—are employee interchange and common day-to-day supervision." *Id.* (footnote omitted). Findings of both little or no separate group identity *and* an overwhelming community of interest are required for the finding of a valid accretion. *Balt. Sun*, 257 F.3d at 428. Underlying this analysis is the "Board's fundamental concern . . . to insure that in cases where such an issue is raised the right of interested employees to determine their own bargaining representative will not be thwarted." *Safeway Stores*, 256 NLRB at 918.

First, RSAs have their own group identity, separate from bargaining unit employees, particularly bus drivers. They have their own unique uniform and their own distinct location to report to each day. Further, they have their own training programs and their own unique Minnie Vans that they drive.

Second, RSAs do not share a community of interest with the Union-represented bus drivers. The two factors "critical" to an accretion finding, employee interchange and common day-to-day supervision, are entirely absent. It is undisputed that RSAs and bus drivers do not interchange roles. An RSA cannot pick up a bus driver's shift and vice versa. TR. 71. Indeed, as described, *supra*, RSAs are not qualified to be bus drivers, as they are not required to have a commercial driver's license or take the required Disney bus driver certification course. Bus drivers are not qualified to be RSAs because they are not required to complete the two-week RSA training program. It is also clear that the day-to-day supervision of each job classification is entirely different. Although they are within the same overarching Disney transportation division, each job classification operates in its own department and shares no common day-to-day supervisors or managers. TR. 47-48. RSAs report to their specific department trailer. Bus drivers report to their designated bus hub. TR. 69. RSAs report to a Minnie Van guest service manager. TR. 47. Bus drivers directly report to their own guest experience manager. TR. 47.

The other accretion factors either are neutral or militate against accretion. There is no integration of operations; RSAs operate in their own separate department within the overarching division of transportation. RSAs and bus drivers do not coordinate their routes, and they operate independent of each other. Bus drivers drive pre-established routes whether or not the RSAs are operating. RSAs respond to guest requests for on-demand transportation irrespective of bus services.

RSAs and bus drivers have no physical contact. They report to different locations and run different transportation programs. The only potential physical contact that would occur is if an RSA used a bus stop for a drop off, or if a bus and Minnie Van passed each other on the property.

RSAs and bus drivers do not have the same skills and functions. Bus drivers are qualified to drive buses, RSAs are not. Bus drivers are trained in bus safety, are required to inspect the buses, and operate a wide-reaching, route-based service for all guests. TR. 67-68, 145. RSAs are not trained in driving, but receive training in guest relations, and operate an on-demand, point-to-point service for certain guests who use the Lyft application. TR. 45, 50, 61.

RSAs and bus drivers do not have the same terms and conditions of employment. RSAs are required to have a valid driver's license, but are not required to have a commercial driver's license. TR. 52-53. RSAs' schedules are demand-based, meaning that their hours are not consistent, but rather are scheduled based on guest demand for their services. TR. 53. RSAs are paid on the merit pay system, which is different from the pay scale for bus drivers outlined in the CBA. TR. 71. Their health insurance premiums, vacations, and sick leave policies are different. TR. 122. The number and amount of breaks are different: RSAs get FLSA breaks and thirty-minute lunches unless otherwise scheduled. TR. 168. Bus drivers have set breaks and lunches, including fifteen-minute breaks every four hours. TR. 168-69. RSAs have a 401(k) retirement plan. Bus drivers' retirement is dictated by the CBA.

The remainder of the accretion factors either were not proven by the Union or are neutral. With respect to centralized control of management and labor relations, the Union failed to show any degree of centralized control. It is true that both bus drivers and RSAs are under the same division of transportation, but there are several layers of management within that division, and

bus drivers and RSAs operate within their own divisions. It is unclear to what extent the department of transportation controls the job classifications. Therefore, this factor is neutral. With respect to geographic proximity, while all job classifications operate on the Disney property, the RSAs and bus drivers do not report to the same locations nor do they operate consistently in the same areas. Thus, this factor militates against accretion or is neutral. Finally, the collective bargaining history factor is neutral because RSAs are a new job classification and there is no collective bargaining history to consider.

Based on the foregoing, the accretion standard has not been satisfied even under current law, and the Board should reverse the RD Decision to clarify the law and keep the RSAs out of the bargaining unit.

CONCLUSION

The Board should grant this Request for review, reverse the RD Decision of May 8, 2018, and overturn, modify or strictly construe the unit clarification and accretion doctrines to better protect employees' Section 7 rights.

Respectfully submitted,

Date: August 9, 2018

/s/ Alyssa K. Hazelwood
Alyssa K. Hazelwood
John C. Scully
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
Telephone: (703) 321-8510
Fax: (703) 321-9319
akh@nrtw.org
jcs@nrtw.org

Counsel for Intervenor Employees